SUPREME COURT, U. S.

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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1970

MILLER-DAVIS COMPANY, a Corporation,

Petitioner,

vs.

PREMIER ELECTRICAL CONSTRUCTION COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Premier Electrical Construction Company, a corporation, respectfully prays that petitioner, Miller-Davis Company's Petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Seventh Circuit entered on March 6, 1970, be denied.

Opinion Below

The Opinion of the Court of Appeals for the 7th Circuit is reported in 422 F.2d 1132.

Question Presented

The respondent disagrees with the question as presented by the petitioner in that the Court of Appeals expressly found as a matter of law that "the allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts." (App. 22). Therefore, even if the judgment in the contract action had been entered prior to the judgment in the antitrust case, the latter would not be barred under the doctrine of *res judicata*.

Statement of the Case

Respondent disagrees with petitioner's statement of the case in that it is based on an erroneous conclusion. On page 3 of its brief petitioner concludes that "The allegations in these three complaints, except as to the theory of recovery, are virtually identical."

As the Court of Appeals pointed out, the essential allegations in the instant case are found in paragraphs 9 and 11 of respondent's complaint wherein a conspiracy is alleged between the defendants, Miller-Davis Company and St. Arnaud Electric Co. for the purpose of limiting competition for the subject construction contract. (App. 18).

The original contract action did not allege a conspiracy but was strictly limited to an alleged violation of a contract between the parties to that suit. St. Arnaud was not a party to the contract action.

On page 6 of its brief petitioner purports to quote from the Opinion of the Court of Appeals, however, it has omitted the following sentence:

> The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts.

and attempted to bridge this gap in its quotation by inserting the phrase "for the reason that".

It is respectfully submitted that inasmuch as the court found as a matter of law that the two causes of action grew out of different operative facts there is no basis for the application of the doctrine of *res judicata*.

Argument

The Petition for Writ of Certiorari should be denied as the Court of Appeals found that each case arose out of "different operative facts" which precludes the application of the doctrine of *res judicata*.

Petitioner's application for Writ of Certiorari is predicated on the erroneous assumption that the instant antitrust action and the prior contract action had a "common nucleus of operative facts". The Court of Appeals expressly found to the contrary, for it stated:

> The allegations of the contract and antitrust complaints here allege essentially different causes of action growing out of different operative facts. (App. 22).

The authorities relied on by petitioner are distinguishable from the instant case in that the doctrine of *res judicata* was found to be applicable only after the court found that both cases arose out of the same operative facts.

As the Court of Appeals stated, the substance of this action is a conspiracy between the defendants which arose prior to the time that petitioner and respondent had any dealings between themselves. (App. 22)

In *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 99 L.Ed. 1122, 77 S.Ct. 865, the plaintiff sought recovery for an alleged violation of the Federal Antitrust Laws arising out of the leasing of motion picture advertising posters. There had been a prior action between the plaintiff and some of the defendants which also involved an alleged violation of the Federal Antitrust Laws which had been settled between the parties and dismissed with prejudice.

The defendants pleaded the prior dismissal with prejudice as *res judicata* in the instant action. The District Court allowed and the Court of Appeals affirmed defendant's motion on the ground that both suits involved "essentially the same course of wrongful conduct". The Supreme Court in reversing the Court of Appeals and remanding the cause to the District Court for further proceedings pointed out:

> That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct . . . may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. 349 U.S. 322, 327-328.

As has been pointed out the instant case involves a conspiracy between the defendants taking place prior to any dealings between the petitioner and respondent which was the subject matter of the original contract action.

The fact that this case involves an alleged violation of the Federal Antitrust Laws is still another ground for denying the application of the doctrine of *res judicata*. For as the court pointed out in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 99 L.Ed. 1122, 77 S.Ct. 865:

> And, as already noted, a prior judgment is res judicata only as to suits involving the same cause of action. There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations.
>
> Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata.

In the instant case if petitioner's contention is accepted it would also in effect confer on them immunity from any civil liability arising under the Federal Antitrust Laws.

Conclusion

It is respectfully submitted that the Court of Appeals properly applied the doctrine of *res judicata* as it applied to the facts in the instant action and the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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